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J. Lambert Gibson; James E. Faust; Attorneys for Respondents;

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No. 8134

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

WEBER BASIN WATER CONSERVANCY DISTRICT,

Plaintiff and Appellant,

vs

ALBERT N. MOORE, and ALICE V. MOORE, his wife, ROY PEAD and MINNIE S. PEAD, his wife,

Defendants and Respondents.

RESPONDENTS' BRIEF

FILED
MAR 31 1954
Clerk, Supreme Court, Utah

J. LAMBERT GIBSON and
JAMES E. FAUST,
1008 Kearns Building
Salt Lake City, Utah
Attorneys for Respondents.

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TABLE OF CONTENTS

TABLE OF CASES CITED

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TABLE OF CONTENTS

TABLE OF CASES CITED (CONTINUED)

TEXT BOOKS

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IN THE

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Plaintiff and Appellant,

vs

ALBERT N. MOORE, and ALICE V. MOORE, his wife, ROY PEAD and MINNIE S. PEAD, his wife,
Defendants and Respondents.

No. 8134

RESPONDENTS' BRIEF

STATEMENT OF FACTS

The Statement of Facts contained in the Brief of Appellant, is restricted and Respondents deem it advisable to make an additional statement to give the Court a complete picture of the property sought to be condemned and its operation.

The property sought to be condemned is the heart of a small, compact, efficient ranching unit,

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located about one mile South of the town of Wanship, Utah. Immediately South, for several miles along the river, are lands which will be inundated by the reservoir. To the East and West are mountains. To the North are more meadow lands and the town of Wanship.

A hard surface road from Wanship to Kamas, Utah, designated as U. S. Highway 189, runs through the Respondents' property, and the ranch house lies immediately to the West of the Highway, and the barns and other out buildings lie immediately to the East of the Highway.

The Weber river crosses Northerly through the property, and immediately, on each side of the river are pasture lands with cottonwood trees growing thereon, which provide pasturage and shelter for the animals. Extending out from the wooded lands to the hillsides, are meadow lands which are cropped and which provide sufficient Winter feed for the animals on the ranching unit. (T. 45)

The ranch, itself, extends from the hillsides on the West, to the hillsides on the East, forming a valley. The hillsides, being fenced, are used for Summer and Winter pasture. Adjoining the ranch property, itself, immediately to the East, and separated only by a fence, the Respondents have approximately a one-third interest in common in a fenced Summer pasture containing about 3,875 acres. (T. 41) In the whole ranching operation there are eleven different pastures or enclosures within fences. (T. 30)

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There is an old coal mine on the hillside to the East of the river and one on the hillside to the West of the river, both in lands being condemned. Appellants drilled holes between the two mines and found a seam of coal, six feet in thickness, underlying the meadow being condemned. (T. 19) No award was made for the coal.

The Respondent, Roy Pead, an elderly man of the age of 68 years, (T. 43), has been able to operate the unit alone, except for very little help during the haying season. Merely by opening a gate in the Spring, the beef cattle of the Respondents can be placed on Summer pasture and then brought back to the ranch proper in the Fall, by opening the same gate. (T. 43) Sheep belonging to the ranch are grazed on the hillside pasture lying to the West of the highway.

There is presently situated on the property, a suitable ranch house, with a substantial stone building connected by a breezeway, used as a coal and wood shed and storage place, lying to the West of the road. On the East side of the road there is a machine shed, a garage, small tool shed, a large barn, a lounging shed, with cement floor and foundation, a granery and a blacksmith shop. (See Appendix with Exhibits). In addition, there is a small three room frame house lying to the South end of the property, with a small stable or barn. (T. 40) The ranch house, itself, is a home of seven rooms; three rooms downstairs and four upstairs, lined with

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brick, with plaster and papered walls, shingle roof and painted. (T. 31) All of the buildings on the ranch operation are included within the area sought to be condemned. In addition, the four wells, one of which has a power pump for culinary use, of the Respondents are also within the area sought to be condemned. From the other wells, the livestock may be watered.

The lands, sought to be condemned, are the choicest lands on the property, and the lands left are of substantially inferior quality. (See Appendix with exhibits). The taking of the property sought to be condemned, so upsets the economic balance, as to render the remaining lands of very little value.

A witness for the Respondents, Alden S. Adams, in a summary of the ranching unit, made the following statement:

> "This is a very good unit because it cuts down on the expense the way it is operated and everything. One man in good health can operate that with very little help, only probably just during hay time, because he can do his own feeding. He has got his cattle and sheep right there where he can turn them out. He has no expense of riding a unit, all under fence, so that he cuts down on his livestock loss and predatory animals, and you might say that the whole unit is built right around his home. And the relationship, or breakdown on his fences and pastures, both to his summer and winter range, cuts down on that expense. Consequently, a man can operate a unit when it is knit together better this way

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than he can on a large unit if the large unit was spread all over, and he had long distances to haul livestock to market, if he had to go out and hire a rider, and had to worry about his calves as soon as they are born, to brand them and such as that, and I would say this is an ideal unit of the present size." (T. 103-104).

Question: "And what would be your opinion of the unit after this heart is taken out of it?"

Answer: "This unit wouldn't be worth anything to an individual because it is cut down so small that a fellow could not run thoroughbreds or anything else on it, because it isn't large enough. In the first place it takes so much hay or so much pasture to feed the average sized unit."

"You have cut this unit down so far now, the only place it would have any value would be if a neighbor could utilize it, but in this respect Mr. Pead has to sell all of his livestock now, because you can not run cattle on the open range or your own summer grazing ground unless you raise enough feed in the winter to take care of them, because a livestock man, at the prices today can not afford to buy that extra hay to feed his livestock." (T. 104)

On cross-examination Mr. Adams stated:

"It would be destroyed as a unit. If you were out as a ranch salesman, you wouldn't even consider it, to look up a buyer. It wouldn't be worth that to you, to advise a buyer, and to sell that kind of property to him." (T. 105)

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A witness for the appellants, Mr. Fred Froerer, in describing the ranch unit:

> Question: "Now, Mr. Froerer, you have had considerable experience in ranching operations. Do you feel that this is by and large a balanced economic unit?"
>
> Answer: "This unit is economic in the view of its accessibility. It has reasonable ease of operation, and I would say that it was just a bit, a little above the average ranch that we can offer as far as unit is concerned, yes, sir." (T. 152)

In describing the unit operation, the same witness had the following to say:

> Question: "Mr. Froerer, as a matter of fact they are taking Mr. Pead's best lands, both ranching and meadow, aren't they?"
>
> Answer: "They are taking the better land of the meadow, the better meadow land. They are taking, oh, about equal grade of these ranch lands within this pink and green color, but you have got a factor here, in order to run this ranch, you have got to consider, if you are going to be fair about it, you have got to consider his 1145 shares of stock in that Wanship Livestock Range Company which joins right onto this place on the East, and which he runs his cattle in there, together with other cattle, and the way it is right around, they have got access to run right here, down here, drink out of the well itself, his own cattle themselves. But that must

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be considered in this, else he couldn't run the unit of cattle he is running." (T. 155-156)

And again, in response to the question:

Question: "As a matter of fact, taking the land and the buildings that you are considering, they are taking the heart right out of his operation aren't they?"

Answer: "Yes sir." (T. 156-157)

As to values of the lands in question, Mr. Adams testified the overall value in the neighborhood of $100,000.00; (T. 111) Mr. Palmer at $90,000.00 (T. 76) and Mr. Froerer at $72,000.00 (T. 150)

Both Mr. Adams and Mr. Palmer testified that the meadow land was worth $400.00 per acre. (T. 71 and 100 and 101) Mr. Froerer testified that the tree land was worth as much as the meadow land. (T. 152.) (Also see appendix exhibit 16) Mr. Adams testified that the hillside land was worth $18.00 per acre, (T. 102, 108) Mr. Palmer that it was worth $15.00 per acre. (T. 71)

All of the above values were for ranching operation and did not include value of the coal.

The Court accepted the invitation of Counsel to get a birds-eye-view of the ranch under condemnation. (T. 54) The Judge and Counsel for both parties went to the property, on the day of the trial, in Mr. Gibson's car and the engineers followed in a

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Government vehicle. The Court was shown the lines dividing the property being taken and the property not being taken. The Court climbed upon a hillock, situated immediately Southwest of the house, from which point one may see the layout of the ranch and all of the land contained in the ranch from a particularly good advantage. The Court walked among the buildings, entered the house and inspected it, and then was driven from the North end of the property to the South end of the property and back. On each occasion, the lines separating the condemned portion and the severed portion of the ranch were pointed out.

POINTS TO BE RELIED ON:

POINT NO. I

THE FINDING OF THE LOWER COURT, ON THE VALUE OF THE PROPERTY CONDEMNED, IS SUPPORTED BY THE EVIDENCE.

POINT NO. II

THE COURT, SITTING WITHOUT A JURY, VIEWED THE PROPERTY UNDER CONDEMNATION, WHICH IN ITSELF IS IN THE NATURE OF EVIDENCE.

POINT NO. III

THERE IS NO REASONABLE OR JUSTIFIABLE BASIS TO CONCLUDE THAT THE COURT ERRONEOUSLY ASSUMED THAT THERE WERE NO HAY AND PASTURE

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LANDS LEFT FOR THE REMAINING RANCHING OPERATION.

ARGUMENT

POINT NO. I

THE FINDING OF THE LOWER COURT, ON THE VALUE OF THE PROPERTY CONDEMNED, IS SUPPORTED BY THE EVIDENCE.

An appellate court may only look into the evidence to ascertain if there exists competent evidence to support the findings of the lower court. In this case, there is evidence to sustain all findings.

Appellant's Brief, on page 11 states that the Plaintiff's appeal is grounded upon the sole point that the lower Court's findings as to the value of the property condemned is without support in the evidence. Appellant complains that the Court found the value on the lands condemned, of some $1800.00 higher than any evidence supports. (Appellant's Brief, page 19.) This is the only error to which Appellant points to upset the decision of the lower Court.

Respondents naturally were interested in ascertaining how the lower Court arrived at its figures. *A simple perusal of the transcript gives figures which the Court obviously used since the result agrees to a penny with the conclusions of the lower Court.*

The Respondents' witnesses, Marcellus Palmer, (T. 71) and Alden S. Adams, (T. 101), testified that the value of the 65 acres of meadow land condemned was, in their opinion, worth $400.00 per

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acre, or a total of $26,000.00. Deducting from that the value of the water rights, not taken, (using the figure of $75.00 per acre for 65 acres, as testified by Torgeson (T. 127) for a total of $4,875.00) leaves a value for those lands of $21,125.00. The 150 acres of hillside pasture land was valued by Mr. Adams at $18.00 per acre, (T. 102, 108) for a total of $2,700.00. There were, in addition, 18 acres of river bottom tree land which Mr. Froerer, Appellant's own witness, testified were of the same value as the meadow land. (T. 152) Taking Mr. Adams' and Mr. Palmer's figure of $400.00 per acre, these 18 acres are worth $7,200.00. Simple addition shows the following:

$21,125.00, value of meadow lands condemned.
$ 7,200.00, value of river bottom and tree lands.
$ 2,700.00, value of hillside pasture lands.

$31,025.00 Total

Adding to the figure of $31,025.00 (value of the lands taken), the amount of the severance damages found by the lower court in the amount of $16,-304.00, and the value found for the buildings in the sum of $20,000.00, we arrive at the figure found by the lower court as the total damage suffered by the defendants by this action, which was the sum of $67,329.00.

Since the only basis advanced by Appellant for reversal of the judgment is that it is not sustained by the evidence, the foregoing is a full and complete answer to its appeal.

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The Court could have found a greater value for the lands condemned according to the testimony of the witness, Fay Bates. Mr. Bates testified that his property adjoins that of the Respondents, immediately to the North, and that his meadow land and hillside grazing land was quite similar to that of the Respondents. (T. 55)

The Answer of the Defendants to the Complaint alleged that the Plaintiff, by its condemnation of the Defendants' property, was destroying the economic unit of the ranch. (R. 9)

The witness, Palmer, testified that this ranch was operated prior to the condemnation, as a balanced unit, and that after the condemnation, the part remaining would not be a balanced unit. (T. 74-75) The recital of Mr. Palmer's qualifications contained in the Record, is an answer to Appellant's statement as to his lack of qualifications, and among other things, shows that he is a licensed real estate broker and fee appraiser. (T. 61-62)

Mr. Adams testified that the operation, prior to condemnation, was a particularly good unit, and that after, the operation would be of very little value. (T. 102 to 105)

Appellant's own witness, Froerer, in response to a question:

> "As a matter of fact, taking the land and the buildings that they are considering, they

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are taking the heart right out of his operation aren't they?"

answered: "Yes sir." (T. 156 and 157)

We submit that the Honorable Court could have and should have found this to be a unit operation and that the measure of damages is that amount which it would require to restore the unit.

State vs. Cooperative Security Corp. of Church, 247 P. 2d 269.

The testimony of Mr. Bates was offered and received for the purpose of showing such amount. Mr. Bates had the only land in the immediate area which could possibly be used to restore the economic balance of the unit. This is so, because the property lying to the South of the Respondents is also being condemned for the same project. The land lying to the East and West of Respondents' property is rugged mountain lands. Below, and to the North of the Bates' property, is the town of Wanship. In other words, there is no other land available to restore the economic balance of the unit, except the Bates proprty. Mr. Bates placed a value of $750.00 per acre on the meadow land. (T. 59) There being 65 acres of this type, the Court could have found this property to have been worth $48,750.00, and adding the value of the 18 acres of river bottom land, at the same figure, there would be a total of $62,250.00. Mr. Bates placed a value of $30.00 per acre on the hillside grazing land, (T. 60) and there being 150 acres

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of this type, these lands would be worth $4,500.00, or a total of $66,750.00, being the amount which would be required to restore the unit, insofar as the land alone is concerned. Adding thereto, the value found by the Court for the building and improvements of $20,000.00, will give a figure of $86,750.00, as a total amount required to restore the economic balance of the unit.

We respectfully suggest that the only error made by the lower Court was prejudicial to Respondents, in its failing to find specifically on the theory of unit operation, and this case should be remanded with directions to the lower Court to enter the said figure of $86,750.00 as the value of the lands and buildings taken in this case. In no other manner can the Respondents be awarded their full damages for the destruction of their economic unit.

The Appellant, in its Brief, (page 29), states that the only way the judgment of the trial Court can be explained is that the Court patently misconstrued the evidence in arriving at the value. The Appellant contends this, even though Mr. Palmer testified that by the taking, the Respondents were damaged in the amount of $80,941.00, (T. 74) and that in his opinion, the whole ranch was worth $90,000.00. (T. 76)

Mr. Adams testified that in his opinion, Respondents were being damaged by the taking in the sum of $81,750.00, (T. 103) and that in his opinion,

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the ranch, itself ,was worth "in the neighborhood of $100,000.00". (T. 111)

It is obvious that the Court could and should have found substantially more than the award made by it, as the damage suffered from this condemnation, and still would have been within the range of the evidence.

The Appellant, in its Brief, makes much of the figures stated in Exhibit "E", the written instrument whereby the Respondent, Pead, purchased the ranch property from the Respondent, Moore. Suffice it to say that the purchase agreement covered not only the real property, but the entire ranching unit of livestock, machinery and other personal property, and the figures placed upon the various items, which were the subject of the sale, are not necessarily indicative of their true value, but only as an itemization between the parties, possibly for tax purposes. It is a known fact that every day, in buying and selling, some people obtain fortunate sales and pay less than the true value of the item purchased, and others, with less shrewdness, pay more. Mr. Pead may have made a fortunate purchase. One sale does not establish a market any more than one robin establishes the season of Spring. Mr. Froerer, Appellant's own witness, testified that in his opinion, the total value of the ranch was substantially in excess of the figure in Exhibit "E". His testimony was, that in his opinion, the ranch was worth $72,000.00. (T. 150) Also, Exhibit "E" is only part of the evi-

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dence and could have been accepted in whole or in part, or rejected in whole or in part by the Court in arriving at its Findings.

18 Am. Jur., page 994

POINT NO. II.

THE COURT, SITTING WITHOUT A JURY, VIEWED THE PROPERTY UNDER CONDEMNATION, WHICH IN ITSELF IS IN THE NATURE OF EVIDENCE.

In Nichols on Eminent Domain, 3rd Ed., Vol. V., pages 66 and 67, it is stated:

> "An award of damages made upon conflicting evidence will not be set aside; it is only when there is no evidence to support it that the court of review will intervene."

> "When the jury or commissioner have taken a view, the court will be especially loath to set aside the verdict or award."

At page 128 of the same work, it states:

> "It is laid down as the general rule that a court will be slow to set aside a verdict in a land damage case when the jury took a view, either on the ground of error, in the admission of evidence, or of inconsistency of the verdict with the weight of the evidence."

It is clear, that in a condemnation suit, that the jury or the Court, as in this case sitting without a

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jury, after having taken a personal view, where the evidence is conflicting, and the view, itself, is in the nature of evidence, can partially rely upon the view. This is true even though their own value, based upon their view, is contrary to the weight of the evidence.

Mauvaisterre Drainage and River District vs. Wabash Railway Co., 132 N.E. 559, 22 ALR 944.

18 Am. Jur., 1004.

See also: 20 Corpus Juris, Sec. 406, page 1013, et seq.

29 Corpus Juris Secundum, Sec. 288 (b), page 1269.

In 18 Am. Jur., Sec. 361, page 1004, it is stated:

"It is sometimes said that the view is merely for the purpose of enabling the jury (the court, if sitting without a jury) better to understand and apply the evidence, but it is generally considered that the jury may take into consideration what they saw on the view in connection with their own knowledge and experience, and fix the damages by both evidence and view. They may not, however, ignore the evidence and base their verdict upon their view or their knowledge of the value of the land in the case, and it is error so to instruct them."

Obviously, the Court, sitting without a jury, in condemnation suits, may rely upon its own infor-

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mation and opinions based upon personal view of the condemned property, as well as upon the testimony. In this case, the Court obviously did both.

POINT NO. III.

THERE IS NO REASONABLE OR JUSTIFIABLE BASIS TO CONCLUDE THAT THE COURT ERRONEOUSLY ASSUMED THAT THERE WERE NO HAY AND PASTURE LANDS LEFT FOR THE REMAINING RANCHING OPERATION.

As the basis for the request for a new trial in this case, not only upon the issue of the value of the property condemned, both land and improvements, but for a retrial upon the issue of severance damages, the Appellant assumes that the Court went upon a mistaken concept, in that all of the approximately 130 acres of meadow lands, (actually 129 acres) were taken in the condemnation suit, and that there were no lands of that type left for the remaining operation, and that having fallen into this alleged error, exaggerated the amount of severance damages. (Appellant's Brief page 29) The first observation which should be made, is that the amount of severance damages awarded by the Court was less than the amount fixed by the testimony of the experts and not beyond their figures. The Court fixed the severance damages at $16,304.00. Mr. Palmer fixed the severance damages in the amount of $20,000.00. (T. 74) Mr. Adams fixed the severance

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damages, "in the neighborhood of $20,000.00". (T. 103)

Based upon this testimony, the Court could have found $20,000.00 as the severance damages instead of $16,304.00.

Appellant seems to be driving a wedge between the Memorandum Decision of the Court, (R. 79) which contained obvious error, later corrected by the Court, and the Findings of Fact and Conclusions of Law. (R. 84) The Memorandum Decision stated that 219.53 acres sought to be condemned, covered *all* the arable land in the ranch and takes in all of the buildings and improvements, including a house, corral, barns, sheds, machine shelters, etc., most of which are very substantially constructed and would probably stand for fifty years more. (R. 79) This was corrected in the Findings of Fact, number 9, (R. 87), where the Court stated the 219.53 acres sought to be condemned covers *much of* the arable land in the ranch and takes in all of the buildings and improvements, including a house, corral, barns, sheds, machine shelters, etc. The same Finding was corrected to read that the dam would be across the canyon or draw, near the *middle* of the ranch rather than at the *lower end*, as stated in the proposed Finding. In addition, in the same Finding, the Court changed the proposed Finding, so as corrected, to read:

> "The strip to be taken encompasses approximately 130 acres of hay, fine pasture lands, a

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> considerable tract of hay land of lesser quality, and, along the stream, cottonwoods and other trees providing shade for animals in the summertime, and storm shelters and wind breaks in the winter." (R. 87)

These changes are initialed by the Court in each instance.

As set forth in the Statement of Proceedings, (R. 102), which is not controverted by the Plaintiffs, the Court, on the hearing held November 20, 1953, on Defendants' Motion to Amend the proposed Findings of Fact and Conclusions of Law, stated that after he had dictated his Memorandum Decision, in the above entitled case, he signed the same without having read it through; and that the Court further stated that the Memorandum Decision *was incorrect and thereupon made the corrections in his own handwriting, which appear on the original of the Findings of Fact and Conclusions of Law.* (R. 102) After the corrections were made, the Court signed the Findings of Fact and Conclusions of Law in open Court.

Obviously, the Court had in mind, that included within the 130 acres of hay land and fine pasture land, there was some of the acreage of the fine pasture lands on the hillsides, and the tree lands, which the Court saw with his own eyes, and to which Mr. Pead, the owner, testified, (T. 49) on cross-examination by Mr. Olmstead:

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Question:

"Now how many acres do you estimate of pasturage, do you have?"

Answer:

"All of my pasture with the exception of the river bottom is hill pasture, the balance of the entire valley, from the hillside on the East to the hillside on the West, are all the same kind of ground. We use some for pasture, which could be used, which is meadow land, if we didn't pasture."

Appellants make much in their Brief of Respondents' Motion to insert the words, "and grazing" in the Findings. It will be noted that the testimony described all the hillside as "pasture lands". The Court was not being super technical in using the words "pasture" and "grazing." The trial court used the word "pasture" as was used in the testimony.

To assume that the trial Court was mistaken, after having seen the land taken, and the land not condemned, and having heard the testimony of the witnesses, is to ascribe to the trial Court a lack of comprehension which is not justified.

CONCLUSION

We submit, accordingly, that there is ample evidence in the Record to sustain the finding of the

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lower Court; that he thoroughly understood which lands were being taken and which lands were being left, and that the only error which the lower Court made, if any, was in not granting damages based upon "unit operation", and that the decision of the lower Court should either be sustained in its entirety, or that this case should be remanded, with directions to the lower Court to enter a figure of $86,750.00 for the damage suffered by Respondents by this action in condemnation.

Respectfully submitted,

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1008 Kearns Building
Salt Lake City, Utah

Attorney for Respondents, Roy Pead and Minnie S. Pead, his wife.

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APPENDIX

Def. Exhibit #15 showing quality of meadow lands taken by condemnation.

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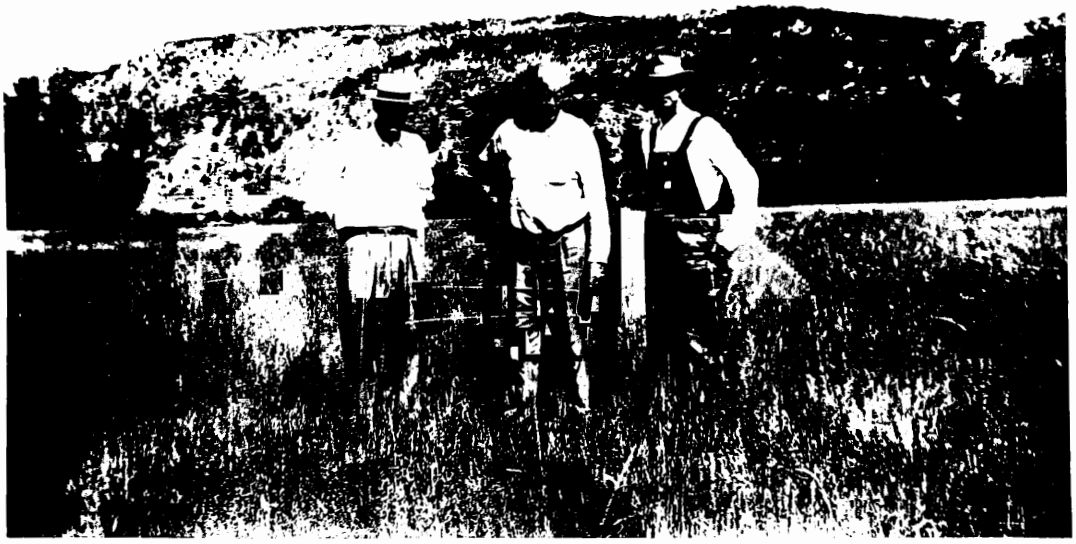

Def. Exhibit #10 showing quality of meadow lands being left.

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Def. Exhibit #16 showing quality of tree pasture land near river taken by condemnation.

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Def. Exhibit #3 showing ranch home taken by condemnation.

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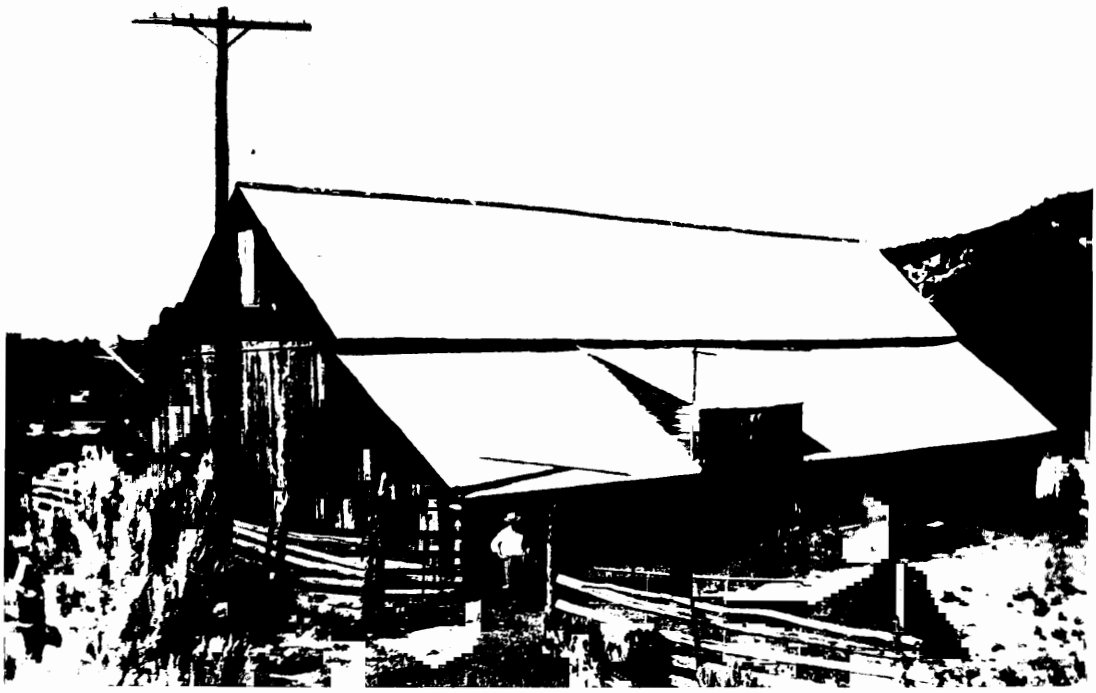

Def. Exhibit #5 showing barn taken by condemnation.

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Def. Exhibit #4 showing garage, shop, lounging shed, chicken coop and pig pen taken by condemnation.

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Def. Exhibit #7 showing machine and tool sheds taken by condemnation.

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Def. Exhibit #8 showing granery
taken by condemnation.

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